FILED

97-248 JUL 28 1997

No. OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

October Term, 1996

DANO RESOURCE RECOVERY, INC.,
*Petitioner,*

*versus*

DISTRICT OF COLUMBIA,
*Respondent.*

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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## Petition for Writ of Certiorari

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51 pp

## Question Presented for Review

Is the decision of the Contract Appeals Board as to Dano's breach of contract claims void because the Contract Appeals Board did not have jurisdiction?

**Parties to the Proceeding**

The caption of this case in this Court contains the names of all parties in United States Court of Appeals for the District of Columbia Circuit.[1]

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[1] The petitioner, Dano Resource Recovery, Inc. (Dano), entered into a joint venture with the Williams Group Limited Partnership. The general partner of the Williams Group Limited Partnership is Williams Environmental Services, Inc., which is a wholly-owned subsidiary company of Williams Industries, Incorporated, a public company.

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## Opinion Below

The opinion the United States Court of Appeals for the District of Columbia Circuit from which petitioner seeks appears in the Appendix hereto at page A-1. The subsequent Order issued by the United States Court of Appeals for the District of Columbia Circuit denying the petitioner's petition for rehearing appears in the Appendix hereto at page A-22. The Opinion of the trial court appears in the Appendix hereto at page A-3. The Judgment Order of the trial court appears in the Appendix hereto at page A-21.

## Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 27, 1997. A timely petition for rehearing was filed on March 28, 1997; an Order denying the petition for rehearing was entered on April 29, 1997. This petition for writ of certiorari was filed within ninety days of April 29, 1997. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

**Statement of the Case**

Dano has been in a web of litigation over the current contract since 1983. The original issues in the underlying contract involved relatively easy contract interpretation questions as to whether or not the District of Columbia was in breach of the contract in question. Dano is still attempting to obtain justice in the matter.

The history of the matter dates back to the seventies. By way of background, in 1979, Dano contracted with the District of Columbia for certain disposal of sludge and solid waste for the respondent. In April, 1981, the respondent terminated said contract for anticipatory breach of contract. After the undersigned counsel first filed suit in the United States District Court for the District of Columbia (see *Dano Resource Recovery, Inc. v. District of Columbia*, Civil Action No. 81-02611, filed October 28, 1981) and then in the Superior Court for the District of Columbia, the petitioner and respondent settled said legal action through the award of a contract in March of 1982, that is the subject of the present action before this Court. Over fourteen years ago, in May of 1983, the respondent improperly

terminated the contract awarded in March, 1982 for the alleged default of Dano. The respondent alleged that Dano had failed to remove certain material from the site twenty-one days after said certain material had arrived on said site. Thereafter, Dano through the undersigned counsel filed a complaint before the Government of the District of Columbia Contract Appeals Board on September 7, 1983, which was pending while Dano through the undersigned counsel filed a third-party action in the United States District Court for the Eastern District of Virginia, Alexandria Division, on September 19, 1983, against the District of Columbia. The filing before the District of Columbia Contract Appeals Board on September 7, 1983, was a protective appeal which was necessary to preserve petitioner's rights in the event the United States District Court for the Eastern District of Virginia, Alexandria Division, required Dano to pursue administrative remedies. (Brief of the District of Columbia, Respondent, in the Fourth Circuit Natkin case, *infra* at page 4.) It is important to understand that the alleged requirement to proceed before the Government of the District of

Columbia Contract Appeals Board was solely a creature of the contract and not otherwise required by law. The Honorable Albert V. Bryan, Jr., of the United States District Court for the Eastern District of Virginia, Alexandria Division, dismissed Dano's action without prejudice. The United States District Court for the Eastern District of Virginia, Alexandria Division and United States Court of Appeals for the Fourth Circuit opinions, *Natkin & Co. v. Dano Resource Recovery. Inc.. et. al.*, No. 83-832-A (E.D. VA., January 13, 1984), *aff'd*, No. 84-1197(L), 84-1618 (4th Cir., August 15, 1985), and the parties' briefs clearly show that the only issue before said courts was whether Dano had failed to exhaust its contractually established administrative remedy prior to seeking relief in the courts. The decisions do not in any way address the merits of Dano's claims nor whether the claims in fact arise under the contract. The United States District Court for the Eastern District of Virginia, Alexandria Division and United States Court of Appeals for the Fourth Circuit merely required Dano to exhaust its administrative remedies before seeking relief in the courts.

Thereafter, while the petitioner, Dano Resource Recovery, Inc.'s appeal was still pending after nearly four years before the Government of the District of Columbia Contract Appeals Board, the petitioner, Dano Resource Recovery, Inc., through the undersigned counsel filed an action in the District of Columbia Superior Court asserting a breach of the disputes clause of the contract; the court dismissed said action without prejudice. See *Dano Resource v. District of Columbia*, 566 A.2d 483 (D.C. App. 1989), wherein the Court held that the failure of the Government of the District of Columbia Contract Appeals Board to set a hearing date after nearly four years did not establish the inadequacy of the administrative remedy. The petitioner, Dano Resource Recovery, Inc., through the undersigned counsel also filed a petition for writ of mandamus in the District of Columbia Court of Appeals requesting that after nearly four years, the Government of the District of Columbia Contract Appeals Board set a date to hear the Dano's appeal before the Government of the District of Columbia Contract Appeals Board. Said petition was denied after the respondent agreed to

establish a schedule for a hearing. *Dano Resource Recovery. Inc. v. Barry,* Appeal No. 87-1304 (March 4, 1988). Over seven years after Dano had file its appeal concerning the contract that is the subject of this action before the Government of the District of Columbia Contract Appeals Board, on December 10, 1990, the Government of the District of Columbia Contract Appeals Board issued its decision dated December 7, 1990, in the matter. Thereafter, in 1993, the District of Columbia Court of Appeals denied Dano's protective appeal of the Government of the District of Columbia Contract Appeals Board's decision dated December 7, 1990. *Dano Resource Recovery, Inc. v. District of Columbia* (620 A.2d 1346, *cert. denied* 114 S.Ct. 343 (1993)).

On March 18, 1991, Dano filed its Complaint before the United States District Court for the District of Columbia that is in issue in this matter. Four years after the respondent filed its first motion to dismiss (dated April 5, 1991), on June 12, 1995, the respondent filed its second motion to dismiss before the United States District Court for the District of Columbia, which the trial court granted.

**Argument**

Dano respectfully requests this Supreme Court to take a look at the fact that Dano is being denied an opportunity to even have its case heard. Dano recognizes the significance of the action to date of the United States Court of Appeals for the District of Columbia Circuit. The United States District Court for the District of Columbia (trial court) dismissed Dano's action without a hearing on the basis of Rule 12(b)(6). Although Dano believes the trial court committed reversible error in its order dismissing this action; there are important constitution issues that are the bases of Dano's complaint filed in the trial court that are being ignored.

It is imperative to focus on the error the trial court committed in ruling the District of Columbia Court of Appeals held that the District of Columbia Procurement Practices Act (DCPPA) applied to Dano's breach of contract claims that were filed in 1983. *See Dano Resource v. District of Columbia*, 566 A.2d 483 (D.C. App. 1989). The District of Columbia Court of Appeals only stated at the time of said decision that the District of

Columbia Procurement Practices Act provided that breach of contract claims are also subject to administrative relief. The District of Columbia Court of Appeals did not rule that the District of Columbia Procurement Practices Act was retroactive to the time that Dano had filed its breach of contract claims in 1983. The trial court stated on page 3 of its opinion (see A-6 and A-7 of the Appendix hereto) that:

> "In its opinion affirming the decision of the Superior Court, the Court of Appeals noted that the DCPPA applied to plaintiff's contract with the district, rejecting plaintiff's contention that the particular breach alleged did not fall within the purview of the DCPPA. Id. At 485 n. 6 . . ."

The cited authority for the above-quoted language of the trial court, footnote numbered 6 (which is quoted in its entirety for context), states:

> "6 Appellant also resorts to the now obsolete distinction between disputes 'arising under' and those 'relating to' a contract in a further attempt to avoid the administrative route. Under prior law, breach of contract claims were not subject to the exhaustion doctrine if they merely 'related to' the agreement, while claims 'arising under' a contract were

> subject to exhaustion of administrative remedies. See, e.g., Savoy, supra, 515 A.2d at 701-02. Under the District of Columbia Procurement Practices Act of 1985, D.C. Code §§ 1-1181, *et seq.* (1987 Repl.), both kinds of causes are committed to administrative relief with limited judicial review. *See generally, Lumbermens Mutual Casualty Co. v. District of Columbia,* D.C.C.A. No. 87-1436 slip op. (D.C. Nov. 15, 1989), decided this day." *Dano Resource v. District of Columbia, supra,* at 566 A.2d 485 n. 6.

Moreover, it is important to note that a decision by the Director is required under the District of Columbia Procurement Practices Act as noted on page 2 of the trial court's opinion:

> "The DCPPA further provides that the CAB is 'the exclusive hearing tribunal for' any appeal by an aggrieved party from a final decision by the Director. D.C. Code Ann. § 1-1189.3 (1992 Repl.)"

Said referenced § 1-1189.3 clearly states that the jurisdiction of the Contract Appeals Board is limited to bid protests and final decisions by the Director:

> "§1-1189.3 Jurisdiction of Board.

> "The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:
>
> (1) Any protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract; and
>
> (2) Any appeal by an aggrieved party from a final decision by the Director which is authorized by this chapter."

Dano's breach of contract claims arose from the actions and inactions of the respondent and its Contracting Officer's Final Decision in 1983 that were pending before the Government of the District of Columbia Contract Appeals Board (Contract Appeals Board)[2] in 1983. Dano's

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[2] As Dano has previously emphasized, the Honorable Albert V. Bryan, Jr., of the United States District Court for the Eastern District of Virginia, Alexandria Division, dismissed Dano's breach of contract claims without prejudice. The opinions of said Court and of the United States Court of Appeals for the Fourth Circuit, *Natkin & Co. v. Dano Resource Recovery, Inc. et. al.*, No. 83-832-A (E.D. VA., January 13, 1984), *aff'd*, No. 84-1197(L), 84-1618 (4th Cir., August 15, 1985), and the parties' briefs clearly show

breach of contract claims were pending in the Contract Appeals Board as a result of the prior procedure whereby the appeal of the Contracting Officer was directly to the Contract Appeals Board. Accordingly, the District of Columbia Procurement Practices Act was never applicable to Dano's breach of contract claims filed and pending in 1983. In *Lumbermans Mutual Casualty Co.v. District of Columbia*, 566 A.2d 480 (D.C. App. 1989), the court noted that it found "no clear indication of whether the DCPPA was intended to apply to contracts entered into before the effective date of the Act." The court only held that the DCPPA required breach claims that occurred after the DCPPA was enacted "to be pursued administratively rather than in the Superior Court" even though the parties entered into a contract before the DCPPA was enacted.

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that the only issue before said courts was whether Dano should exhaust its contractually established administrative remedy prior to seeking relief in the courts for its breach of contract claims. The decisions do not in any way address the merits of the Dano's breach of contract claims nor whether the breach of contract claims in fact arise under the contract; Dano was merely required to exhaust its administrative remedies before seeking relief in the courts for its breach of contract claims.

The court did not rule that a breach of contract claim that occurred prior to the enactment of the DCPPA was subject to the DCPPA. In fact, the court went on to state that: "The DCPPA became effective on February 21, 1986, after appellant's [Lumbermans Mutual Casualty Co.] contracts with the District were entered into but before any alleged breach occurred." *Id.*, at 566 A.2d 482. One of the critical facts is that Dano's breach of contract claims occurred prior to the enactment of the DCPPA. The court then stated:

> "The Act provides that '[a]ll claims by a contractor against the District government *arising under or relating* to a contract shall be in writing and shall be submitted to the Director [of the Department of Administrative Services] for an informal hearing and decision.' *Id.* § 1-1188.5(a). A contractor may appeal the decision of the Director to the Contract Appeals Board. . ." *Id.*, *Lumbermans* at 566 A.2d 482.

Dano's breach of contract claims were already pending in the Contract Appeals Board when the DCPPA was enacted and therefore had passed the stage where a claim would be submitted to the District of Columbia government

and then appealed to the Contract Appeals Board. Note that in *Jones & Artis Construction Co. v. District of Columbia Contract Appeals Board*, 549 A.2d 315, 322 (D.C.App. 1988), the District of Columbia Court of Appeals stated that:

> ". . . As a consequence of incorporating the old Board as the interim new Board under the 1985 Act, this order expanded the Board's jurisdiction to permit adjudication of protest in addition to its pre-existing jurisdiction limited to appeals. . . ." (Footnote omitted.)

Thus, Dano's breach of contract claims that occurred in 1983 and had been filed and pending before the Contract Appeals Board since 1983 were therefore pre-existing before the Contract Appeals Board when the DCPPA became enacted. Accordingly, because Dano objected to the Contract Appeals Board having jurisdiction over Dano's breach of contract claims, Dano contends that the decision from said Contract Appeals Board is void. The District of Columbia Court of Appeals only has jurisdiction to hear appeals directly from the Contract Appeals Board if the DCPPA applies to the claims. *See Jones & Artis Construction Co. v. District of Columbia Contract*

*Appeals Board*, *supra* at 549 A.2d 317-318. Both the trial court and the District of Columbia Court of Appeals recognize the dichotomy between Dano's breach of contract claims and Dano's claims under the contract. *See United States v. Utah Construction and Mining Company*, 384 U.S. 394, 401-402 (1966); *Bethlehem Steel Corporation v. Grace Line. Inc.*, 135 U.S.App.D.C. 81, 416 F.2d 1096, 1101 (D.C.Cir. 1969); *General Dynamics Corporation v. United States*, 214 Ct.C1. 607, 558 F.2d 985 (1977) for the distinction between claims that are under the contract versus claims that are in breach of the contract. Hence, the Contract Appeals Board did not have subject matter jurisdiction to hear Dano's breach of contract claims. Accordingly, the judgment of the Contract Appeals Board is void as to Dano's breach of contract claims.

The law is clear that a void judgment is not subject to issue preclusion. Because Dano objected to the Contract Appeals Board's jurisdiction of Dano's breach of contract claims, the decision of the Contract Appeals Board is void as to Dano's claims of breach of contract. In 1857, 140 years ago, in *Dynes v. Hoover*, 61 U.S.

65, 81 (1857), this Supreme Court of the United States stated:

> "Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial . . . In such cases, everything which may be done is void--not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment. In England, it has been done by the civil courts, ever since the passage of the 1 Mutiny act of William and Mary, ch. 5, 3d April, 1689."

Contrary to the above-quoted language of 140 years ago from this Supreme Court of the United States, the courts have failed to redress Dano's breach of contract claims to date.

In *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 608-609, 110 S.Ct. 2105, 2109 (1990), this Supreme Court restated that a judgment from a court without jurisdiction is void:

> "The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see Bowser v. Collins, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482), and

> was made settled law by Lord Coke in Case of the Marshalsea, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase *coram non judice*, [495 U.S. 609] 'before a person not a judge'--meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. See, e.g., Grumon v. Raymond, 1 Conn. 40 (1814); Picquet v. Swan, 19 F.Cas. 609 (No. 11,134) (CC Mass.1828); Dunn v. Dunn, 4 Paige 425 (N.Y.Ch. 1834); Evans v. Instine, 7 Ohio 273 (1835); Steel v. Smith, 7 Watts & Serg. 447 (Pa.1844); Boswell's Lessee v. Otis, 9 How. 336, 350, 13 L.Ed. 164 (1850)."

In *Schlesinger v. Councilman*, 420 U.S. 738, 746-747, 95 S.Ct. 1300, 1307 (1975), this Supreme Court stated that void judgments are subject to collateral attack:

> "But this general rule carries with it its own qualification--that the court-martial's acts be 'within the scope of its jurisdiction and duty.' Collateral

> attack seeks, as a necessary incident to relief otherwise within the court's power to grant, a declaration that a judgment is void. (Footnote omitted) A judgment, however, is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes. (Footnote omitted) On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.
>
> . . .
>
> "But, as the Court has recognized in the past, there is no necessary inconsistency between this and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction. (Footnote omitted) In Gusik v. Schilder, 340 U.S. 128, 71 S.Ct. 149, 95 L.Ed. 146 (1950)"

In *Gosa v. Mayden*, 413 U.S. 665, 702, fn. 7 (1973) this Supreme Court stated:

> "Restatement of Judgments § 7 comment b, pp. 42--43 (1942):

"'There are many situations in which a court lacks competency to render a judgment. Thus, although a State has jurisdiction to grant a divorce of parties domiciled within the State, a decree of divorce rendered by a court which is not empowered to entertain suits for divorce is void. Similarly, a judgment rendered by a justice of the peace is void if under the law of the State such justices are not empowered to deal with the subject matter of the action; as, for example, where the action is one for tort and justices of the peace are given no power except in actions of contract. So also, where a court is given power to deal with actions involving no more than a designated amount, the statute limiting the amount is ordinarily construed not merely to make erroneous a judgment rendered by such a court in excess of its power,

> but to make such judgment void.'"

Also see *Ellis v. Dyson*, 421 U.S. 426, 441, 95 S.Ct. 1691, 1699, n.6 (1975) (void judgments may be collaterally impeached); *Custis v. U.S.*, 114 S.Ct. 1732, 1737 (1994) (conviction pronounced by a court without jurisdiction is void); *Costello v. U.S.*, 365 U.S. 265, 285, 81 S.Ct. 534, 544 (1961) (lack of jurisdiction over subject matter renders a judgment void and subject to collateral attack); and, *Fay v. Noia*, 372 U.S. 391, 423, 83 S.Ct. 822, 840-841 (1963) (void judgments may be collaterally impeached). In fact, in *Fay v. Noia*, 372 U.S. 391, 423, 83 S.Ct. 822, 840 (1963), this Supreme Court also stated that an appeal of a void decision does not restore said void decision:

> "As put by Mr. Justice Holmes in his dissenting opinion in Frank v. Mangum, supra, 237 U.S., at 348, 35 S.Ct., at 595: 'If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above.'"

Hence, Dano's appeal of the void decision of the Contract Appeals Board to the District of Columbia Court of Appeals did not restore said

void decision of the Contract Appeals Board as to Dano's breach of contract claims. Once the decision became void, it remained void.

The trial court's decision by the Honorable Stanley S. Harris is built upon the erroneous finding that Dano is precluded from going forward on Dano's breach of contract claims. The fact that the District of Columbia Court of Appeals denied Dano's motion to dismiss its protective appeal does not resurrect the void judgment of the Contract Appeals Board as to Dano's breach of contract claims. See *Dano Resource Recovery. Inc. v. District of Columbia*, 620 A.2d 1346 (D.C.), *cert. denied*, 114 S.Ct. 343 (1993).

## Conclusion

It is completely unconscionable that the respondent required Dano to invest millions of dollars in building a plant for the respondent on respondent's property and that respondent has been in material breach of the contract since 1983. The Contract Appeals Board was only a creature of the contract between the parties; Dano objected to the jurisdiction of the Contract

Appeals Board as to its breach of contract claims and only proceeded therein as a protective measure. With all due respect, the denial of this petition will condone the actions of the respondent. Thus, Dano Resource Recovery, Inc. respectfully requests that this Honorable Supreme Court grant the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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July 28, 1997

# APPENDIX

# United States Court of Appeals
For The District of Columbia Circuit

No. 96-7100

DANO RESOURCE
RECOVERY, INC.,

Appellant

v.

DISTRICT OF COLUMBIA,

Appellee

UNITED STATES COURT
OF APPEALS FOR THE
DISTRICT OF COLUMBIA
CIRCUIT FILED FEB 27
1997 CLERK

BEFORE: Ginsburg, Sentelle, and
Henderson, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance and the response thereto, it is

ORDERED the motion for summary affirmance be granted substantially for the

reasons stated by the district court in its order filed April 25, 1996. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

/s/
/s/
/s/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| DANO RESOURCE RECOVERY, INC., | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 91-571 SSH |
| DISTRICT OF COLUMBIA, | ) | FILED APR 25 1996 |
| Defendant. | ) | Clerk, U.S. District Court District of Columbia |

OPINION

Before the Court are defendant's motion to dismiss and plaintiff's opposition thereto. Upon consideration of the entire record, defendant's motion to dismiss is granted.

BACKGROUND

Because the past history of this case dictates its outcome here, that history is reviewed in some detail. On March 3, 1982, plaintiff Dano Resource Recovery, Inc., ("Dano") entered into a contract with the District of Columbia to build and operate a sludge and solid waste composting

plant at the District's Blue Plains waste treatment facility. A standard dispute clause in the contract provided that any dispute "arising under" the contract would be decided by the Contracting Officer of the District of Columbia, and that a contractor could appeal the decision of the Contracting Officer within 30 days to the Contract Appeals Board ("CAB"). Pl.'s Compl., Ex. 1, ps. 16-17. Under the terms of the contract, the decision of the CAB would be "final and conclusive . . . subject to . . . review as may be provided by law." Id.

On April 11, 1983, the District notified plaintiff of several concerns it had regarding plaintiff's failure to perform in accordance with certain contract specifications. On May 9, 1983, after plaintiff had failed to remedy most or all of its lapses, the District declared plaintiff to be in default and terminated the contract. Plaintiff appealed the District's decision to the Contracting Officer, and in September 1983, when its appeal to the Contracting Officer proved unsuccessful, plaintiff appealed the Contracting Officer's decision to the CAB.

Relevant Procedural History

Between 1983, when plaintiff appealed to the CAB, and 1990, when the CAB issued a lengthy determination upholding the decision of the Contracting Officer, several pertinent developments occurred. First, in 1985, the District of Columbia City Council passed the District of Columbia Procurement Practices Act ("DCPPA"), D.C. Code Ann. § 1-1181.1 et. seq. (1992 Repl. & 1995 Supp.). The DCPPA provides that "[a]ll claims by a contractor against the District government arising under or relating to" a contract shall be submitted to the Director of the Department of Administrative Services (hereinafter "Director") for an informal hearing and decision.[1] D.C. Code Ann. § 1-1188.5(a). The DCPPA further provides that the CAB is "the exclusive hearing tribunal for" any appeal by an aggrieved party from a final decision by the Director. D.C. Code Ann. § 1-1189.3 (1992 Repl.) In essence, the DCPPA did away with previous

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[1] Pursuant to a Mayor's Order of March 2, 1984, the Director of Administrative Services is the central procurement official of the city. See D.C. Code Ann. §§ 1-1181.7(22), 1-1182.3.

distinctions between claims "arising under" a contract and claims "relating to" the contract. See District of Columbia v. Savoy Constr. Co., 515 A.2d 698 (D.C. 1986) (pre-DCPPA case, holding that provision of dispute clause for resolution of "any dispute arising under the contract" by the Contracting Officer, with right of appeal to the CAB, did not apply to claims for breach of contract).

On July 6, 1987, while plaintiff's appeal to the CAB was pending, plaintiff filed an action for breach of contract against the District in the Superior Court of the District of Columbia. The Superior Court judge dismissed plaintiff's action because plaintiff had failed to exhaust its available administrative remedies, and on November I5, 1989, the District of Columbia Court of Appeals affirmed the dismissal. Dano Resource Recovery v. District of Columbia, 566 A.2d 483, 487 n.8 (D.C. 1989) (Dano I)[2]. In its

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[2] Plaintiff also filed a third-party action against the District in 1984, in the federal district court for the Eastern District of Virginia, where plaintiff was a defendant in a suit brought by a subcontractor. The district court dismissed plaintiff's third-party claim against the District, finding that

opinion affirming the decision of the Superior Court, the Court of Appeals noted that the DCPPA applied to plaintiff's contract with the District, rejecting plaintiff's contention that the particular breach alleged did not fall within the purview of the DCPPA. Id. at 485 n.6; see also Lumbermens Mut. Casualty Co. v. District of Columbia, 566 A.2d 480 (D.C. 1989) (holding that the DCPPA applied to contracts entered into prior to the date of enactment of the DCPPA).[3]

On December 7, 1990, after years of discovery and following an administrative hearing which consumed 84 days the CAB issued a 73-page decision upholding the contract termination,

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plaintiff had not exhausted its administrative remedies with respect to the District, and the United States Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal of plaintiff's third-party action. See Dano I, 566 A.2d at 487 n.8.

[3] After it filed its notice of appeal from the dismissal, but before the Court of Appeals had heard argument, plaintiff filed a petition for writ of mandamus in the Court of Appeals, requesting that the Court of Appeals order the CAB to set a date to hear plaintiff's case. See Dano I, 566 A.2d at 484 n.4. "After the District filed a memorandum explaining the procedures that were being followed," the Court of Appeals denied plaintiff's petition. Id.

sustaining the District's claim for certain costs of equipment removal and site clean-up, but awarding Dano approximately $152,000 improperly withheld by the District. On January 9, 1991, plaintiff appealed the decision of the CAB to the District of Columbia Court of Appeals, pursuant to the DCPPA. See D.C. Code Ann. § 1-1189.5(a).

In its notice of appeal from the CAB decision, and in its concurrently-filed "Petition for Review" of the CAB decision, plaintiff stated that it was filing an appeal "solely as a protective appeal," and that it "contend[ed] that the [DCPPA] is not applicable to this matter." Suppl. Mem. in Supp. of Def's [First] Mot. to Dismiss, Attachs. 1, 2. On July 19, 1991, the District of Columbia Court of Appeals issued an Order requiring the parties to brief the issue whether the DCPPA applied to plaintiff's appeal.

In response to that Order, on July 31, 1991, Dano filed a "motion to dismiss" its appeal. Plaintiff argued in its brief that the DCPPA conflicted with the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code Ann. §§ 1-201 to 1-299.7 (1992

Repl.) ("Self-Governnent Act"), because it allegedly altered the jurisdiction of the District of Columbia courts.[4] Therefore, plaintiff argued, the DCPPA was unconstitutional. See Def.'s [Second] Mot. To Dismiss, Ex. B, at 6-12. Dano also argued in its motion to dismiss its appeal that the CAB "was not the proper forum to hear Dano's breach of contract claims," id. at 14, and that it "was entitled to a trial de novo" on its breach of contract claims, id. at 18.

Defendant filed an opposition to Dano's motion to dismiss its appeal responding to Dano's constitutional claims and its claims that the CAB lacked jurisdiction to hear its appeal from the adverse decision of the Contracting Officer. See Def.'s [Second] Mot. To Dismiss, Ex. C. On January 13, 1992, the Court of Appeals denied Dano's motion to dismiss its appeal. On February 23, 1993, the Court of Appeals issued

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[4] The Self-Government Act provides that the Council of the District of Columbia has no authority to, inter alia, "[e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of District of Columbia courts)." D.C. Code Ann. § 1-233(a)(4) (1992 Repl.)

an opinion affirming the decision of the CAB. Dano Resource Recovery, Inc. v. District of Columbia, 620 A.2d 1346 (D.C.), cert. denied. 114 S.Ct. 343 (1993) ("Dano II"). Plaintiff petitioned the Supreme Court for a writ of certiorari to the Court of Appeals. Plaintiff's petition for writ of certiorari presented the following question:

> Whether the enactment by the District of Columbia City Council of the Procurement Practices Act of 1985, which purports to grant exclusive jurisdiction over disputes between contractors and the District of Columbia to the District of Columbia Contract Appeals Board, and which thereby deprives the District of Columbia trial courts of jurisdiction over breach of contract claims brought by contractors against the District, was beyond the authority delegated to the Council by the District of Columbia Home Rule Act.

Def.'s [Second] Mot. To Dismiss, at 4. The Supreme Court denied plaintiff's petition for a writ of certiorari on October 18, 1993. See Dano Resource Recovery. Inc. v. District of Columbia, 114 S.Ct. 343 (1993).

The Current Action

On March 18, 1991, after plaintiff had appealed the CAB decision to the District of Columbia Court of Appeal, but before the Court of Appeals had rendered its decision, plaintiff filed this action. This Court stayed the case pending resolution of plaintiff's appeal in the District of Columbia Court of Appeals. Dano Resource Recovery, Inc. v. District of Columbia, Civ. No. 91-571 SSH (D.D.C. June 30, 1992). Although plaintiff thereafter informed this Court of the decisions of the Court of Appeals and of the Supreme Court, neither party moved the Court to lift the stay it had imposed in 1992. The Court lifted the stay sua sponte on April 5, 1995. On June 12, 1995, defendant filed a motion to dismiss plaintiff's complaint; on June 26, 1995, plaintiff filed an opposition. Most of plaintiff's claims are barred by the doctrine of issue preclusion, and the rest of plaintiff's claims are devoid of merit. Accordingly, the Court grants defendant's motion to dismiss.

## DISCUSSION

Plaintiff's complaint contains seven counts. In Count I, plaintiff requests the Court to issue a declaratory judgment that the DCPPA conflicts with the Self-Government Act, because it allegedly alters the jurisdiction of the District of Columbia courts. In Count II, plaintiff claims that the District breached its contract with plaintiff and requests "a trial de novo for its breach of contract claims" and "at least" $70 million in damages. In Count III, plaintiff alleges that the findings of the CAB in its 73 page decision were "fraudulent, arbitrary, capricious, so grossly erroneous as to necessarily imply bad faith, or were not supported by substantial evidence," and plaintiff requests de novo review of the decision of the CAB.

Count IV consists of a request for monies allegedly owed plaintiff by the District. Count V alleges that the District violated plaintiff's due process rights, because the CAB did not set a hearing date on plaintiff's appeal "from at least the period of time between September 9, 1986 and early 1988," and because the CAB's decision did not issue until 1990. Count VI alleges that

the District violated plaintiffs rights under the Fourteenth Amendment and Count VI alleges that the DCPPA unconstitutionally impaired plaintiff's contract with the city. The Court will address each of these Counts in order.

Count I: Plaintiff's Challenge to the Self-Government Act

Plaintiff's contention that the DCPPA violates the Self-Government Act is barred by the doctrine of issue preclusion, or collateral estoppel. "The doctrine of issue preclusion holds that once an issue is actually and necessarily determined by a court of competent jurisdiction that determination is conclusive against a party to the prior proceeding in a subsequent suit based on a different claim." Synanon Church v. United States, 820 F.2d 421 (D.C. Cir. 1987) (citing, inter alia, Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979)). Not only did the District of Columbia Court of Appeals in Dano I hold that the DCPPA applied to plaintiff's claims, but in Dano II the parties fully briefed the same constitutional issue plaintiff persists in asserting here -- namely, that the Self-Government Act renders the DCPPA

unconstitutional. The Court of Appeals in Dano II rejected this contention and went on to affirm the decision of the CAB. In so doing, it rendered its decision on plaintiff's constitutional arguments "necessary" to support the judgment in Dano II. See Synanon Church, 820 F.2d at 424. Plaintiff's petition for a writ of certiorari asserted the same constitutional question raised, briefed, and resolved in Dano II, and the Supreme Court denied plaintiff's petition. This Court will not revisit such well-trodden ground. See Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1079 (D.C. Cir. 1987) (noting that "one who has actually litigated an issue should not be allowed to relitigate it") (quoting Restatement (Second) of Judgments at 6 (1982)).

Counts II, III, and IV: Plaintiff's "Appeal" from the CAB

Plaintiff attacks the decision of the CAB on two different angles in Counts II and III of its complaint. In Count II, plaintiff requests the Court to ignore the decision of the CAB (and apparently that of the Court of Appeals affirming

the CAB) and hold a trial de novo on plaintiff's breach of contract claims.[5] In Count III, in contrast, plaintiff requests the Court to review the decision of the CAB (and apparently to ignore the decision of the Court of Appeals) and find the CAB decision, inter alia, "fraudulent" and unsupported by the facts.

The Court will neither conduct a de novo review of plaintiff's CAB appeal nor review it according to the standard employed by the District of Columbia Court of Appeals in plaintiff's first (and proper) appeal to that court. Both Counts II and III are precluded by the ruling in the Court of Appeals in Dano II. Plaintiff fully briefed both its contention that the CAB was not the proper forum for its appeal and its contention

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[5] The Court of Appeals had not issued its decision in Dano II when plaintiff filed its action in this Court. In plaintiff's opposition to defendant's second (1995) motion to dismiss, however, plaintiff argues that the decision of the Court of Appeals "may be void," because the Court of Appeals did not have "competent jurisdiction" to hear the appeal. This argument is without merit. Because the DCPPA applies to plaintiff's contract claims, the Court of Appeals was the proper forum for plaintiff's appeal from the CAB and therefore was a court of "competent jurisdiction" for the purposes of its appeal.

that it was entitled to a trial de novo on its contract claim, in its motion to dismiss its appeal in Dano II. The Court of Appeals denied plaintiff's motion to dismiss its appeal and went on to issue an opinion upholding the decision of the CAB, implicitly rejecting both plaintiff's request for a trial de novo and its assertion that the CAB lacked jurisdiction to hear plaintiff's appeal in the first place.

The Court of Appeals has previously held that plaintiff's contract with the District is governed by the DCPPA. See Dano I, 566 A.2d at 485 n.5; see also Lumbermens Mutual, 566 A.2d at 480. Because the contract is governed by the DCPPA, plaintiff must follow the avenues of redress prescribed in the DCPPA; that is, plaintiff must take an appeal from the Director (now the Contracting Officer) to the CAB, and subsequently to the District of Columbia Court of Appeals. D.C. Code Ann. §§ 11189.4-5(a). Plaintiff availed itself of this route. When plaintiff's appeals proved unsuccessful plaintiff additionally sought a writ of certiorari from the Supreme Court of the United States, and the Supreme Court denied plaintiff's petition. In effect, plaintiff is now attempting to

attack collaterally in this Court the series of well-reasoned decisions from the CAB and the District of Columbia Court of Appeals. Plaintiff's attempt to relitigate its case is not grounded in reason or law, and it therefore fails.

Count IV of plaintiff's complaint consists only of a request for money allegedly owed plaintiff by the District, though the information plaintiff presents on this claim is far from adequate. From what the Court can discern after terminating its contract with plaintiff the District withheld approximately $476,000 in funds due and owing Dano, to recoup the cost of removing Dano's equipment and of disposing of almost 40,000 tons of compost material. The CAB found that the District was entitled to receive $323,767.00, and that the District owed Dano $152,475, compounded at 4% interest from the date the claim was received by the District. See Suppl. Mem. in Supp. Of Def.'s [First] Mot. To Dismiss, Attach. 3, at 72 (CAB decision). The Internal Revenue Service ("IRS") apparently asserted a tax lien against the joint venture of which Dano was a part. Because the Court herein disposes of any claims which could

conceivably be termed "federal questions," and because Count IV presents (if anything) a question regarding enforcement of the CAB decision and the obligations of the District visa-vis Dano, Count IV presents no cognizable federal question. Nor will the Court assert supplemental jurisdiction over this issue, if a justiciable issue it is.

Counts V, VI, and VII: Plaintiff's Constitutional Claims

Plaintiff's claims in Count V are barred by the doctrines of issue preclusion and claim preclusion. Plaintiff's first allegation -- that the CAB violated its due process rights by taking seven years to issue a decision -- was squarely determined in Dano I. 566 A.2d at 486-87 (holding that Dano had failed to show that the CAB appeal process was inadequate or that resort to the CAB was otherwise futile). Plaintiff's suggestion that the low interest rate awarded it by the CAB was a "taking of property" is precluded under the doctrine of claim preclusion. See Clark-Cowlitz, 826 F.2d at 1079 ("a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have

another chance to do so") (quoting Restatement (Second) of Judgments at 6 (1982)). Plaintiff had ample time and opportunity to contest this aspect of the CAB's decision before the Court of Appeals, and this Court will not entertain its untimely challenge

Plaintiff's claim in Count VI is meritless, because the Fourteenth Amendment does not apply to the District of Columbia. See Bolling v. Sharpe, 347 U.S. 497 (1954). Finally, plaintiff's claim in Count VII that the DCPPA impaired its contractual obligations was argued (and implicitly rejected) in plaintiff's motion to dismiss its appeal in the D.C. Court of Appeals. See Def.'s Mot. To Dismiss, Attach. B, at 13-14. Accordingly, this claim, too, is barred.

## CONCLUSION

Had the Court an inkling in 1992, when it issued its Order staying this case, that plaintiff would persist in asserting claims clearly barred or of no merit following the resolution of its appeal to the District of Columbia Court of Appeals, the Court would have dismissed this action without

prejudice. Now, after years of litigation, thousands of pages of transcripts and discovery, and nearly a hundred pages of analysis from the CAB and the Court of Appeals upholding the District's decision to terminate its ill-fated contract with plaintiff, plaintiff has the temerity to suggest not only that all of its prior claims are still justiciable by this Court, but that discovery should be conducted as well. Pl.'s Opp. to Def.'s [Second] Mot. To Dismiss at 1. Plaintiff is in error. Defendant's motion to dismiss is granted. An appropriate Order accompanies this Opinion.

/s/

Stanley S. Harris
United States District Judge

Date: APR 25 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| DANO RESOURCE RECOVERY, INC., | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 91-571 SSH |
| DISTRICT OF COLUMBIA, | ) | FILED APR 25 1996 |
| Defendant. | ) | Clerk, U.S. District Court District of Columbia |

OPINION

For the reasons stated in the accompanying Opinion, it hereby is

ORDERED, that defendant's motion to dismiss is granted.

SO ORDERED.

/s/

Stanley S. Harris
United States District Judge

Date: APR 25 1996

# United States Court of Appeals
For The District of Columbia Circuit

No. 96-7100

DANO RESOURCE
RECOVERY, INC.,

Appellant

v.

UNITED STATES COURT OF
APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT
FILED APR 29 1997 CLERK

DISTRICT OF COLUMBIA,

Appellee

BEFORE: Ginsburg, Sentelle, and
Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed March 28, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk